

A took the view that drug trafficking posed a serious problem to the nation and the world at large, a situation which must be dealt with sternly. Appraising himself of the maximum penalty for the offence under our law as being 15 years' imprisonment, he accordingly imposed the prison term of 8 years.

It is now apparent, however, that the learned Principal Judge sentenced the appellants under an outdated legislation. For, under the Dangerous Drugs Ordinance, as amended by Act Number 13 of 1988 each of the convictions entered against each appellant attracted a minimum of 7 years' imprisonment and a maximum of 20 years' imprisonment, or a fine equal to the value of the drugs in question (which according to the charge sheet is TZS. 8 533 000 000 in this case) but in every case it shall not be less than TZS. 10 million. When Professor Shaidi's attention was drawn to this amendment, he still maintained that the sentence as imposed was excessive. For our part we, like the learned Principal Judge, think that drug trafficking poses a grave problem both nationally and globally. It must be strongly discouraged by taking stern measures against those who are proved to engage in it, and in such alarming quantities as in this case involving 5.3 tons of *cannabis sativa* resin. In this respect we have asked ourselves whether had the sentencing judge appraised himself of the correct law as amended he would have imposed the same sentence as he did. We think he would not because there is considerable difference between a maximum of 15 years' imprisonment and that of 20 years' imprisonment. The sentence ought to reflect that difference. In the circumstances we think that a sentence of 10 years' imprisonment will meet the justice of the case. Accordingly the sentence meted out to the first and second appellants on the first, second and fourth counts are each enhanced to 10 years' imprisonment, to run concurrently.

In the result the appeal of the first and second appellants against their convictions is dismissed, and the sentences are enhanced as stated above. The appeal by the third appellant Fita Ndekiro Ulomi is allowed. As already stated, his conviction is quashed and the sentence set aside.

SAMWELI MOYO v. MARY CASSIAN KAYOMBO

HIGH COURT OF TANZANIA AT MBEYA

(Moshi, J.)

(PC) CIVIL APPEAL No. 21 OF 1996

(From the decision of the District Court of Mbeya at Mbeya in Civil Appeal No.124 of 1995, S.M. Rumanyika – Resident Magistrate)

Family Law – Matrimonial assets – Division of matrimonial assets upon divorce or separation – Power of the court to order division – Conditions upon which the court may order division – Section 114(1) of the Law of Marriage Act 1971.

Family Law – Maintenance – Order of maintenance for divorced wife – Order of divorce granted without a request for it and without ascertaining husband's means and ability to pay – Whether the order was properly given – Section 115 of the Law of Marriage Act 1971.

The parties to this appeal were granted divorce by the Primary Court which nevertheless declined to order division of matrimonial assets as it found that the assets were not matrimonial property. The District Court, on appeal by the respondent, ordered division of the assets and also ordered maintenance to be paid to the respondent. Upon further appeal to the High Court:

Held: (i) Under section 114(1) of the Law of Marriage Act 1971 the court may order division of assets only if the assets are matrimonial assets acquired by the parties during the marriage and through their joint efforts;

(ii) As the assets in this case were acquired neither during the marriage nor through the joint efforts of the parties, the District Court erred in ordering division of those assets;

(iii) As the order for maintenance was never asked for, and no enquiry was made into the means of the appellant about his ability to pay, and the divorce did not have the undesirable effect of pushing the respondent into any particular hardship, the order for maintenance was improperly given by the District Court.

A Appeal allowed

Case referred to:

(1) *A.M. Kimweri v. Yusufu Athumani*, [1970] HCD n.119

B Statutory provision referred to:

(1) Law of Marriage Act 1971, sections 114(1), 115

JUDGMENT

(Dated 3 July 1998)

D MOSHI, J.: This appeal arises from orders for division of matrimonial assets and maintenance made by the District Court of Mbeya. The assets in question were two houses at Nzovwe Area within the Municipality of Mbeya, and two pieces of land (plots), one at Nzovwe and the other at Inyala Area.

E The parties contracted a Christian marriage on 1 November 1983. Two issues came out of the marriage. On 11 July 1995 the respondent, Mary Cassian Kayombo, petitioned for divorce before the Urban Primary Court of Mbeya which was granted on 19 October 1995.

F The Primary Court was satisfied, upon the evidence before it, that the named properties were not matrimonial assets acquired by their joint efforts during the marriage within the meaning of section 114(1) of the Law of Marriage Act 1971, hereinafter called the Act. It was

G amply established in evidence that the properties were acquired through the efforts of the appellant alone before the marriage was contracted. So the Primary Court did not, and rightly so, make an order for the division of matrimonial assets. Also no order for the maintenance of the children was made as the children were staying with the appellant.

H And no order for the maintenance of the respondent was made in the obtaining circumstances. The respondent was then a personal secretary at the RDD's Office. She is now employed in a private company. The absence of an order for division of matrimonial assets

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aggrieved the respondent who, in consequence, preferred an appeal to the District Court of Mbeya. **A**

The District Court (S.M. Rumanyika, RM) upheld the very sound finding of the Primary Court that the relevant properties were not matrimonial assets acquired by the joint efforts of the parties during the marriage. The learned magistrate, like the Primary Court, was satisfied that the properties were personal to the appellant which he had acquired before the marriage. However, for reasons based upon lack of proper understanding of the relevant provisions of the Act, the learned magistrate went ahead and ordered the division of those properties between the parties. The two plots or pieces of land, one at Nzovwe and the other at Inyala, were given to the respondent. An order for the maintenance of the respondent by the appellant at the rate of TZS. 50 000 per month until she remarried or died effective 29 January 1996 was also made. The appellant, quite expectedly, felt aggrieved; hence this appeal in which both parties entered appearances before me and argued their respective sides of the matter themselves. **B**

Three grounds of appeal were preferred by the appellant. They were: **C**

1. That both Lower Courts had no jurisdiction to entertain the matter in that there had never been any reference of the matrimonial difficulty to a Marriage Conciliatory Board. **F**
2. That the learned Appellate magistrate, having found as a fact that the marriage between the appellant and the respondent was contracted in 1983, erred in law in ordering division of property that was individually acquired in 1982 by the appellant alone. **G**
3. That the learned Appellate Magistrate erred in law in ordering maintenance allowance to be paid by the appellant to the respondent in a case where the latter is the cause of all problems in the matrimonial home. **H**

It was conceded by both parties in the course of the hearing of this appeal that the matrimonial difficulty had been referred to a Marriage **I**

A Conciliatory Board in terms of section 101 of the Act. So the first ground of appeal becomes invalid. The second ground of appeal, however, has merit. The power of the court to divide matrimonial assets is derived from section 114(1) of the Act which reads:

B 114(1) The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such assets and the division between the parties of the proceeds of sale

C From the citation to, and the wording of, section 114(1) of the Act, it is apparent that the assets envisaged thereat must firstly, be matrimonial assets; secondly, they must have been acquired by them during the marriage; and thirdly, they must have been acquired by their joint efforts. These three conditions must exist before the court's power to divide matrimonial or family assets under section 114(1) is invoked. In this case, the second and third conditions were not established. D The relevant assets were acquired before the marriage by the efforts of the appellant alone. Under section 114(3) of the Act, reference to assets acquired during a marriage includes assets owned before the marriage by one party which have been substantially improved E during the marriage by the other party or by their joint efforts. This, however, was not established to have been the case here. I am satisfied F that the District Court erred in law in its order for the division of the assets. That order was clearly perverse and it must be quashed.

G I pass on to consider the third ground of appeal. In terms of section 115(1)(e) of the Act the court may order a man to pay maintenance to his wife or former wife when granting or subsequent to the granting of a Decree of divorce. This power is discretionally which must be H exercised judicially and/or reasonably. The Act prohibits the exercise of this power unless for special reason. The provision to section 115 reads:

I Provided that where the marriage has been dissolved, the wife shall not, unless the court for special reason so directs, be entitled to maintenance

for herself for any period following the date when the dissolution takes effect. A

In this case, I am satisfied that the respondent was not entitled to the order for her maintenance. The District Court did not give any reason for the Order, let alone special reason for it. The respondent B had not asked for her maintenance at the trial and before the District Court. This would account for the fact that the Primary Court, in its good sense, did not make such an order. It would appear that the order for maintenance was an undeserving gift from the District Court C to the respondent. And more, the Order was made without first inquiring into the means of the appellant. It was arbitrarily made. It is the law that maintenance must be fixed in relation to husband's means: see *A.M. Kimweri v. Yusufu Athumani* (1). This omission to ascertain D the means of the appellant, that is to say, how much he could afford to pay, before determining a figure, was fatal to the award for maintenance. And lastly, that Order for maintenance was, in the circumstances, E completely unnecessary. She had not been a full time domestic wife. She had not sacrificed her own career on the alter of matrimonial life. She remained employed and self-earning during the marriage and after divorce. The divorce, therefore, could not, and did not, in F the circumstances, have had the undesirable and sad effect of practically thrusting her into destitution. I am satisfied that the District Court, likewise, erred in law in its order for the maintenance of the respondent. That order had not been the result of judicial and reasonable exercise of discretion. It must likewise, be quashed. G

I accordingly allow the appeal, and hereby quash and set aside the District Court's orders for division of the relevant assets and for the maintenance of the respondent. No order is made as to the costs of this appeal. H